BALA KRISHNAN APPALA NAIDU A

v.

KETUA INSPEKTOR PRABAKARAN SHANMUGAM & ORS (NO 2) B

HIGH COURT MALAYA, KUALA LUMPUR
VT SINGHAM J
[CIVIL SUIT NO: S-21-159-2002]
28 OCTOBER 2010 C

CIVIL PROCEDURE: *Pleadings - Statement of claim - False imprisonment - Allegation against police - Allegation that remand order as obtained by police was defective - Illegality or defectiveness of remand order not specifically pleaded - Whether plaintiff barred from raising unpleaded issues - Whether could rely on general averments in statement of claim* D

TORT: *False imprisonment - Allegation against police - Vicarious liability of Government - Tortfeasor - Whether to be named as co-defendant - Failure to cite actual or alleged tortfeasor as party - Whether Government not capable of vicarious liability - Government Proceedings Act 1956, ss. 5, 6* E

The plaintiff had been arrested by the first defendant on 3 January 2000 and was detained at the Rawang Police Station until 5 January 2000. Alleging wrongful imprisonment, the plaintiff filed the present tort action against the first defendant, the second defendant Officer in Charge of Rawang Police Station and the Government of Malaysia vicariously claiming various relief and damages. It was the plaintiff's pleaded case that his detention was unconstitutional and unlawful, as no remand order for the detention had been obtained by the defendants. This plea however ran counter to the facts, as a remand order ('D16') had been obtained from the Magistrate by the Investigating Officer, one Chief Inspector Mohd Ghazali ('IO'). At the trial, upon being confronted with D16, the plaintiff maintained that the defendants were still liable to him, as "the remand order was defective in law". It was the plaintiff's stand, in regurgitating the unpleaded allegation, that he was entitled to rely on the general averments in his statement of claim. Be that as it may, upon the obtaining facts, issues arose before the learned judge as to; (i) whether the plaintiff could on the facts and in the circumstances be allowed to F G H I

raise the issue of illegality or defectiveness of D16; and (ii) whether, bearing in mind the Government Proceedings Act 1956 and the fact that the IO herein had not been named as a defendant, the Government of Malaysia could ever be capable of vicarious liability.

Held (dismissing claim):

(1) The plaintiff is not permitted to raise issue or issues which is not his pleaded case. In this case, the plaintiff did not plead that D16 was defective. The plaintiff's complaint, as repeatedly submitted by learned counsel, is that the plaintiff was detained without a remand order from 3 January 2000 to 5 January 2000. Consequently, there was only one issue for this court to decide, namely, whether there was a remand order obtained to detain the plaintiff for the relevant period. (paras 7-10)

(2) The plaintiff cannot use the general averments in the statement of claim to raise other allegations or issues against the defendant. Such allegations or issues must be specifically pleaded, so as to put the defendants on notice right from the beginning of the trial. (para 13)

(3) The defendants have produced a copy of the remand order D16, which was granted by a Second Class Magistrate by the name of Tuan Haji Saad bin Ismail. The remand order, to all intents and purposes, was properly obtained and valid in law and consequently the plaintiff's detention was not false imprisonment as alleged. On this ground alone, the plaintiff's claim must fail. (paras 35, 37-38)

(4) Section 6(1) of the Government Proceedings Act 1956 limits the liability of the Government in respect of any act, neglect or default of any Public Officer. The alleged tortfeasor in this case is the IO, and therefore he has to be cited as a defendant before any vicarious liability could be found against the Government. The inclusion of the IO apart, since the plaintiff's arrest was not an issue, the plaintiff ought to have withdrawn his claim against the first defendant (paras 19 & 32)

Obiter:

(1) If the plaintiff's case is that the remand order is defective or invalid in law, the plaintiff should have taken up his complaint by way of criminal revision or appeal against the decision to remand the plaintiff and followed the procedure as laid down under the Criminal Procedure Code to challenge the remand order. (para 34).

(2) The plaintiff had ample opportunity to apply to amend the writ by including the IO as a defendant. Regrettably, the plaintiff had proceeded with the trial without citing him as such and the plaintiff must be prepared to accept the decision of the court. (para 31)

Case(s) referred to:

Blay v. Pollard & Morris [1930] 1 KB 628

Chong Fook Kam & Anor v. Shaaban & Ors [1968] 1 LNS 23 FC ***(refd)***

Ee Kim Kin v. The Collector of Land Revenue, Alor Gajah [1967] 1 LNS 41 HC ***(refd)***

Government of the State of Sabah v. Syarikat Raspand [2010] 7 CLJ 945 CA ***(refd)***

Haji Abdul Rahman v. Government of Malaysia & Anor [1966] 1 LNS 60 HC ***(refd)***

Haji Mohamed Dom v. Sakiman [1955] 1 LNS 26 HC ***(refd)***

How Paik Too v. Mohideen [1967] 1 LNS 57 FC ***(refd)***

In Re The Detention of S Sivarasa & Ors [1997] 1 CLJ 471 HC ***(refd)***

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(foll)***

Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***

Madjai Sanusi v. Pengarah Imigresen Negeri Johor & Ors [1999] 7 CLJ 569 HC ***(refd)***

Natesan v. Goh Gok Hoon [1968] 1 LNS 86 FC ***(refd)***

PB Securities Sdn Bhd v. Autoways Holding Bhd [2000] 4 CLJ 811 CA ***(refd)***

Ravintharan Perumal v. Kuppusamy Aiyasamy [2005] 2 CLJ 213 HC ***(refd)***

Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors [2002] 2 CLJ 543 HC ***(refd)***

Saul Hamid Pakir Mohamad v. Inspector Abdul Fatah Abdul Rahman & Anor [1999] 1 LNS 83 HC ***(refd)***

Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors [2000] 4 CLJ 508 HC ***(refd)***

Syarizan Sudirmin & Ors v. Abdul Rahman Bukit & Anor [2010] 3 CLJ 877 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 31
Criminal Procedure Code, ss. 28(1), 117, 323
Federal Constitution, art. 5(4)
Government Proceedings Act 1956, ss. 5, 6(1)
Police Act 1967, s. 20
Subordinate Courts Act 1948, s. 79(1), Fourth Schedule

For the plaintiff - M Manoharan; M/s M Manoharan & Co
For the defendants - Iznain Hj Ishak SFC (Norhafizah Kamardin FC with him); AG's Chambers

Reported by Wan Sharif Wan Ahmad

JUDGMENT

VT Singham J:

[1] The plaintiff's claim is for general damages, including exemplary and aggravated damages, special damages, interest and costs for false/wrongful imprisonment against Chief Inspector Prabakaran a/l Shanmugam, the first defendant, who was the arresting officer (now Deputy Superintendant of Police), the Ketua Balai Polis Rawang, the second defendant and the Government of Malaysia, the third defendant.

[2] Briefly, the background facts, as obtained from the plaintiff's statement of claim is as follows:

The plaintiff was arrested on 2 January 2000 at about 2am by the first defendant and detained at the Rawang Police Station from 2 January 2000 till 5 January 2000 without having obtained the remand order pursuant to art. 5(4) of the Federal Constitution, s. 28 and s. 117 of the Criminal Procedure Code. The plaintiff was then released unconditionally by the first and second defendants on 5 January 2000. The plaintiff has alleged that as a result of the wrongful detention, he has suffered mental agony, distress and loss of income.

Article 5(4) of the Federal Constitution reads:

> Where a person is arrested and not released he shall without unreasonable delay, in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority.

Section 28 of the Criminal Procedure Code reads:

> **28. How person arrested is to be dealt with and detention for more than twenty-four hours.**
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> (1) A police officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions herein as to bail or previous release take or send the person arrested before a Magistrate.
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> (2) No police officer shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable.
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> (3) Such period shall not in the absence or after the expiry of a special order of a Magistrate under section 117 exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate.

Section 117 of the Criminal Procedure Code reads:

> **117. Procedure where investigation cannot be completed within twenty-four hours.**
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> (1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall immediately transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate.

[3] On the other hand, the defendants have denied the plaintiff's claim. The defendants have pleaded that the plaintiff was arrested on 3 January 2000 at about 1.35am. Subsequently, an application to remand the plaintiff was made by the Investigating Officer, Chief Inspector Mohamad Razali bin Taib (DW2) (now Deputy Superintendant of Police) to the Magistrate who had ordered the plaintiff to be detained for further investigation for three days from 3 January 2000 to 5 January 2000 (see remand order exh. D16). The defendants have also pleaded that the Government of Malaysia will only be vicariously liable if the first and second defendants are found liable by virtue of ss. 5 and 6 of the Government Proceedings Act 1956 and s. 20 of the Police Act 1967.

[4] In the present case, it is not in dispute that the Investigating Officer, Chief Inspector Mohamad Razali bin Taib (now Deputy Superintendant of Police) was not cited as a defendant. The learned Senior Federal Counsel had submitted that the Investigating Officer ought to have been named as the defendant and only if he is found liable for the alleged tortious act, will the Government of Malaysia, the third defendant, be vicariously liable for the wrongful or tortious act allegedly committed by the Investigating Officer, that is, the plaintiff was detained for more than 24 hours without having obtained the remand order as required by s. 117 of the Criminal Procedure Code. The learned Senior Federal Counsel had referred to ss. 5 and 6 of the Government Proceedings Act 1956. Regrettably, the plaintiff had instead named the arresting officer as the first defendant although the arrest of the plaintiff is not an issue for this court to decide and this has been repeatedly conceded by learned counsel for the plaintiff that the arrest of the plaintiff is not the issue and the plaintiff's complaint is that, there was no remand order obtained against him for his detention from 3 January 2000 to 5 January 2000.

[5] By para. 7 of the statement of claim, the plaintiff has pleaded as follows:

> Plaintif plid defendan-defendan pertama dan kedua telah gagal, enggan dan/atau abai untuk memperolehi perintah reman sepertimana yang dikehendaki di bawah seksyen 28 dan seksyen 117 Kanun Acara Jenayah, Akta 593 dan di bawah Perkara 5(4) Perlembagaan Persekutuan, Malaysia.

[6] The only issue as agreed by both parties for this court to determine is as per para. 2 of the 'Isu-Isu Untuk Dibicarakan (encl. 24)' which reads:

> Samada defendan pertama dan defendan kedua ada memperolehi perintah penahanan reman selanjutnya pada 3.1.2000 sehingga 5.1.2000 sepertimana yang dikehendaki di bawah seksyen 28 dan seksyen 117 Kanun Acara Jenayah dan di bawah Perkara 5(4) Perlembagaan Persekutuan Malaysia.

[7] Accordingly, the decision of this court is confined to the plaintiff's cause of action and the agreed issue to be tried. As stated above, the one and only issue which both parties had agreed for this court to decide is, whether there was a remand order obtained to detain the plaintiff from 3 January 2000 till 5 January 2000.

[8] As to the complaint that the remand order was defective, it was not the plaintiff's pleaded case. It has been said time and time again that parties are bound by the pleadings and if it is intended to raise other issue or issues, the same must be placed on the record by amendment. (see *Blay v. Pollard & Morris* [1930] 1 KB 628 at p 6340). This court finds that there is in fact no relief prayed to declare or to strike out the remand order as being defective as alleged. The plaintiff's statement of claim did not plead that the remand order (exh. D16) which was granted by Tuan Haji Saad bin Ismail (DW1) is defective or invalid. The contention raised on behalf of the plaintiff was that, there was in fact no remand order obtained against the plaintiff. Therefore, the plaintiff is not permitted to raise issue or issues which is not his pleaded case and against the agreed issue for this court to determine.

[9] As stated above, the plaintiff's case is not based on the allegation that the remand order which was obtained was defective. In fact learned counsel for the plaintiff had repeatedly submitted that the only complaint of the plaintiff in the present action is that, there was no remand order obtained to detain the plaintiff pursuant to the arrest. However and regrettably, when the remand order was identified and produced through DW1 who granted the remand on the application of the Investigating Officer (DW2), learned counsel for the plaintiff, with respect, as an afterthought and as a last ditch attempt had changed his stand by submitting that the remand order (exh. D16) which was produced is defective. This court is of the considered view that it would be unjust to permit learned counsel for the plaintiff to resile from his course of conduct and by such conduct, he is estopped from challenging the remand order (exh. D16) as this will go against his repeated undertaking to this court and for this court to decide the only and one issue namely, whether there was in fact a remand order for the plaintiff to be detained from 3 January 2000 to 5 January 2000. The remand order was in fact included in the bundle of documents (encl. 30).

[10] If the plaintiff was serious in challenging the remand order, he ought to have applied to amend his pleadings to include this complaint that the remand order was defective. As stated above, the plaintiff's complaint and which was repeatedly submitted by learned counsel for the plaintiff in the course of his submission is that, the plaintiff was detained without a remand order from 3 January 2000 till 5 January 2000.

[11] In *Ee Kim Kin v. The Collector of Land Revenue, Alor Gajah* [1967] 1 LNS 41; [1967] 2 MLJ 89 Ismail Khan J (as he then was) said at p. 91:

> … I do not think that the applicant should be allowed to blow hot and cold. See judgment of Scrutton LJ in *Verschures Creameris Ltd v. Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608, 611 which reads:
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> > A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election-namely, that no party can accept and reject the same instrument. The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

[12] In *PB Securities Sdn Bhd v. Autoways Holding Bhd* [2000] 4 CLJ 811 the Court of Appeal said at pp. 822-823:

> We refer to 16 *Halsbury's Law of England* (4th Ed) para 1507:
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> Approbation and reprobation. On the principles that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppels by record and estoppels in pais. The principle that a person may not approbate and reprobate expresses two propositions: (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile; and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.
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> In *Amalgamated Investment & Property Co Ltd (in liquidation) v. Texas Commerce International Bank* [1981] 3 All ER 577, the court approved the following passage from Spencer Bower and Turner on *Estoppel by Representation* (3rd Ed) 1977 at p 591:
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> This form of estoppels is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into

which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed.

[13] This court wishes to stress that the plaintiff cannot use the general averments in the statement of claim and raise other allegations or issues against the defendants unless pleaded specifically in the statement of claim which in turn would put the defendants on notice right from the beginning of the trial.

[14] In *Natesan v. Goh Gok Hoon* [1968] 1 LNS 86; [1968] 2 MLJ 3 at p. 8, H.T Ong FJ (as he then was) said:

Above everything else is the fact that learned counsel for the appellant now sets up a case which not only is not founded upon, but contrary to, this appellant's own pleadings. We should be creating an absurd precedent to consider allowing this appeal, on any ground, without even any application for consequential amendment of the defence pleaded. Any amendment, at this stage, setting up a case which amounts to volt-face, is naturally out of the question.

[15] In *How Paik Too v. Mohideen* [1967] 1 LNS 57; [1968] 1 MLJ 51 at p. 52, H.T Ong FJ (later CJ Malaya) for the Federal Court allowed an appeal on the grounds that the High Court Judge who heard the appeal from the decision of the learned magistrate decided an issue that no demand for rent had been made by the landlord on the premises and that demand on the premises was necessary before rents could be lawfully due. However, as stated above, this complaint was not pleaded in the statement of defence. H.T Ong FJ said:

With respect, I think the decision of the learned judge was wrong. In the first place, the point was never pleaded in the defence; consequently it was not a fact in issue requiring the magistrate to make any finding thereon.

[16] In *Haji Mohamed Dom v. Sakiman* [1955] 1 LNS 26, his Lordship Mathew CJ said:

I think it is clear that a judge is bound to decide a case on the issue on the record and that if there are other questions they must be placed on the record, which in this case they were not, *Blay v. Pollard & Morris* (at p 634). (see *State Government of Perak v. Muniandy* [1986] 1 MLJ 490 at p 492).

[17] In *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196, Sharma J said at pp. 196-197:

> It was not open to the learned magistrate to fly off at a target as it were and disregard the pleading in order to reach a conclusion that he might though was just and proper. It was held by Scrutton LJ in the case of *Blay v. Pollard & Moris*: 'Cases must be decided on the issues on record; and if it desired raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course.' (*See Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; ([1991] 1 CLJ (Rep) 239) pp 671 and 673 (at pp 244-246). (See also *Nor Azlina Abdul Aziz v. Aminah Omar* [1998] 2 CLJ 527), *Muniandy a/l Periyan & Anor v. Eric Chew Wai Keat & Anor* [2003] 3 MLJ 527 at p 562-569).

[18] In *Blay v. Pollard and Morris* [1930] 1 KB 628 at p. 634, Scrutton LJ said:

> Case must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.

[19] It is important to state that s. 6(1) of the Government Proceedings Act 1956 limits the liability of the Government in respect of any act neglect or default of any Public Officer. In order for the liability to be established against the tortfeasor, the Investigating Officer has to be cited as a tortfeasor who is alleged to have committed the tortious act before the Government of Malaysia can be found vicariously liable. In the present case, the plaintiff's complaint must have been intended against the Investigating Officer as the alleged tortfeasor. Therefore, the Investigating Officer should have been cited as a defendant. The Government of Malaysia is not a tortfeasor. They are only vicariously liable as principal if the Investigating Officer is found to be liable for the tortious act alleged against him. In other words, vicarious liability against the Government of Malaysia as the principal will arise only if the public officer who is named as a party is found to be liable for the tortious act. The Government of Malaysia can only be vicariously liable pursuant to ss. 5 and 6 of the Government Proceedings Act and not as a tortfeaser and this will only arise if the public officer is found to be liable for the tortious act. The success of the plaintiff would depend on

establishing personal liability of the tortfeasor, in the present case, the Investigation Officer; being the public officer. The Government of Malaysia is not in any sense a tortfeasor.

[20] In *Syarizan Sudirmin & Ors v. Abdul Rahman Bukit & Anor* [2010] 3 CLJ 877, I found the Government of Malaysia vicariously liable for the negligent act of the policeman as he was cited and named as the first defendant.

[21] Section 5 of the Government Proceedings Act 1956 reads:

Liability of the Government in tort

5. Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

[22] Section 6 of the Government Proceedings Act 1956 reads:

Limits of liability of the Government

6(1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

(2) Any written law which negatives or limits the amount of the liability of any public officer in respect of any act, neglect or default committed by that officer shall, in the case of proceedings against the Government under section 5 in respect of such act, neglect or default of such officer, apply in relation to the Government as it would have applied in relation to such officer if the proceedings against the Government had been proceedings against such officer.

(3) No proceedings shall lie against the Government by virtue of section 5 in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

A (4) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless that officer was at the material time employed by the Government and paid in respect of his duties as an officer of the Government wholly out of the revenues of the Government, or any fund certified by the appropriate financial officer for the purposes of this subsection or was at the material time holding an office in respect of which the appropriate financial officer certifies that the holder thereof would normally be so paid.

(5) For the purposes of subsection (4) the expression 'appropriate financial officer' means, in respect of the Federal Government, the Minister of Finance, and in respect of the Government of a State, the State Financial Officer, and in the case of the States of Sabah and Sarawak, the State Minister responsible for finance.

[23] In *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543 Mohd Noor Ahmad J (as he then was) said at p. 555:

These provisions (which is referred to s. 5 and s. 6 of the Government Proceedings Act, 1956) require that the identity of the officer must be ascertained and the liability of the officer must be established before the government can be made liable.

[24] In *Haji Abdul Rahman v. Government of Malaysia & Anor* [1966] 1 LNS 60; [1966] 2 MLJ 174:

the plaintiff sued the Government of the Federation of Malaysia and the Public Works Department, Kelantan, Kota Bharu for damages arising from a traffic accident. It was alleged that somebody left an unlighted steam roller belonging to Government parked on the road at night causing the deceased who was riding a motor-cycle to crash into it with fatal consequences.

One of the issues raised in *Haji Abdul Rahman v. Government of Malaysia & Anor* was, whether the action would lie against the Government as principal when the servant of the Government was not also a defendant to the action.

Abdul Aziz J (as he then was) said at p. 175:

All this contemplates that the identity of the officer must be ascertained and the liability of the officer must be established before the Government can be made liable. In my view, therefore, the preliminary objections taken by the State Legal Adviser are well taken and the objections will be allowed.

The action will, therefore, be dismissed with costs.

[25] In *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663, Nik Hashim FCJ said at p. 678: A

> I entirely agree with the views expressed by Abdul Aziz J (later FJ) in *Haji Abdul Rahman, supra*. Contrary to the finding of the Court of Appeal, *Haji Abdul Rahman* was correctly decided and should be upheld. Therefore, on the proper construction of ss. 5 and 6 of Act 359, in any claim in tort against the Government, the officer of the Government who was responsible for the alleged tortious act must be made a party and his liability be established before the Government can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against the officer personally can a claim be laid against the Government. B C
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> In the present case, all the eight causes of actions are actions in tort or tort-based premised on the act or omission of an individual. None of the Governments sued is capable of committing the wrong pleaded. Since the Governments' liability in tort can only be vicarious by virtue ss. 5 and 6 of Act 359, and as the officers who were responsible for the alleged wrongdoing were not joined as defendants to the action, it is therefore not possible in law to maintain a successful claim in tort against the Governments as primary tortfeasors. That being so, the appellants' application to strike out the respondents' actions is meritorious. (See also *Ponnusami v. Ratnam & The Government of Malaysia* [1965] 1 MLJ 268 at p 270). D E F

[26] In *Government of the State of Sabah v. Syarikat Raspand* [2010] 7 CLJ 945, Low Hop Bing JCA said at pp. 963-965:

> [35] In essence, s. 5 provides for the vicarious liability of the government for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as the vicarious liability of a private principal for his agent. G
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> *[36] Section 6 expressly prohibits the bringing of any proceedings against the government for damages under s. 5 unless the action for such wrongful act, neglect or default would have lain against the officer personally. This is a substantive provision that goes to the jurisdiction of the court. Liability can only be attributed to the government where the officer's act, neglect or default is proved to have established the liability of the officer personally. In the absence of the officer's liability, (which can only arise and bind the officer(s) if and when the officer or officers are cited as defendants),* no proceedings shall lie against the government. H I

Where no such proceedings could lie against the government, the court is in no position to exercise any jurisdiction in relation thereto. (emphasis added).

[37] Section 5 and 6 were judicially considered by the High Court in *Haji Abdul Rahman v. Government of Malaysia & Anor* [1966] 2 MLJ 174 (HC). There, the plaintiff brought an action to recover damages arising out of a traffic accident in which a government steam roller had been parked on the road at night. The deceased motorcyclist had crashed into it. The government servant was not joined as a defendant to the action. The issue was whether the action against the government as principal was bad in law. The High Court, having examined ss. 5 and 6, concluded that the identity and liability of the government servant must be ascertained and established before the government could be made liable.

[38] An apparently conflicting view appears to have been taken in *Lai Seng & Co v. Government of Malaysia & Ors* [1973] 2 MLJ 36. There, the dispute was in relation to 12 customs duties payable depending on the applicable taxing code to the plaintiff's goods. The defendants were (1) the Government of Malaysia; (2) the Controller-General of Customs and Excise; and (3) the Assistant Controller of Customs and Excise, Penang and Butterworth. The High Court held that in an action for tort, the proper defendant is the tortfeasor, but the person who is liable for the acts of the wrong-doer to whom the liability for the injury was passed is also a proper defendant. In the circumstances, the High Court held that the presence of the government was sufficient.

[39] The above two High Court judgments were the subject matters of scrutiny by the Federal Court in *Lay Kee Tee & Ors*. There, 184 respondents' (plaintiffs') causes of action were merely against the governments and were tort-based *viz* negligence, breach of fiduciary duties, breach of statutory duties, negligent misstatement, fraud etc. In essence, the relevant question was whether ss. 5 and 6 require the alleged tortfeasors who are the public officers or employees of the government to be named and be sued in the claim. In delivering the judgment of the Federal Court, Nik Hashim FCJ agreed with the decision in *Haji Abdul Rahman*. The Federal Court distinguished *Lai Seng & Co*, on the basis that the claim arose out of the revenue laws while *Haji Abdul Rahman*, was governed by ss. 5 and 6. In the circumstances, the Federal Court held, *inter alia*, as follows:

[16] Therefore, on the proper construction of ss. 5 and 6 of the Government Proceedings Act, 1956 in any claim in tort against the government, the officer of the government who was responsible for the alleged tortuous act must be made a party and his liability be established before the governments can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against the officer personally can a claim be laid against the government. (emphasis added).

[17] In the present case, all the eight causes of actions are actions in tort or tort-based premised on the act or omission of an individual. None of the governments sued is capable of committing the wrong pleaded. *Since the governments' liability in tort could only be vicarious by virtue of ss. 5 and 6, and as the officers who were responsible for the alleged wrongdoing were not joined as defendants to the action, it was therefore not possible in law to maintain a successful claim in tort against the governments as primary tortfeasors.* That being so, the appellants' application to strike out the respondents' actions is meritorious. (emphasis added).

[40] Reverting to the instant appeal, we note that the alleged tortfeasors *viz* government servants or officers had not been stated as defendants. This omission on the part of the plaintiff has resulted in the failure to satisfy the requirements of ss. 5 and 6. That being the position, no proceedings shall lie against the government ie the defendant therein, and consequentially, the High Court could not exercise jurisdiction in relation thereto.

[27] In *Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors* [2000] 4 CLJ 508, James Foong J (now FCJ) said at pp. 599-600:

The question whether he is personally liable is of course a question for the court on evidence. But it is to me somewhat surprising and, I think, misleading, to refer him, as the evidence does, as the 'nominal' or 'nominated' defendant. Such language seems to suggest that the issues at trial are really issues between the plaintiffs and the Crown and that the defendant mentioned as a party merely as a matter of convenience. That is not the true position. The court before whom such a case as this comes have to decide it as between the parties before them and have nothing to do with the fact that the Crown stands behind the defendant. For the plaintiff to succeed, apart from the statute, they must

prove that the defendant himself owed a duty of care to the plaintiffs and has failed in discharging that duty. Whether the plaintiff in the present case would succeed in doing this it is superfluous to inquire, since the decision goes against them on other grounds; but it may be useful to put on record, in passing, that the success of the plaintiffs would depend on establishing the personal liability of the defendant to them, as the Crown is not in any sense a party to the action.

When there is a necessity to first decide whether a particular officer or officers, as the case may be, is negligent or has committed a tortious wrong, before the Government can be held liable, then it is absolutely necessary and essential to identify and name the particular officer or officers whom the plaintiff alleged committed the negligence or tortious wrong. If he is not liable then the government is also exempted from liability. This is the concept of vicarious liability under common law. In this situation we have even statutory provisions to affirm this approach where they continuously assert and declare the need to determine fault of the particular officer before the government can be held liable. This clearly implies a need to identify and distinguish the officer or officers concerned before the plaintiffs can proceed with attributing liability to the government. In the situation at hand, only the drainage and irrigation department was named in respect of matters related to drainage. This is a department operated by officers. Who then was the officer or officers who committed the act or omission? Without him being specified and singled out how could liability against him be ascertained. Without the determination of his liability how could the tenth defendant be found liable. Similarly in respect of other acts or omission involving the surrendered lands no individual was specified or mentioned, not even the particular department of State's machinery. Such defects, in my opinion are too serious and fundamental for such proceedings against the Government to succeed; it must fail for non-compliance of the legislative provisions laid down for such action against a State Government. (emphasis added).

[28] This court wishes to stress that decisions of the Court of Appeal and the Federal Court on questions of law and interpretation or construction of a statutory provision or rules of the court are strictly binding on this court based on the doctrine of *stare decisis*:

[29] In *Ravintharan Perumal v. Kuppusamy Aiyasamy* [2005] 2 CLJ 213 I have said at p. 233: A

> It is important for this court to remind itself that decisions of the Court of Appeal and the Federal Court on questions of law and principles of law are strictly binding on this court as to propositions which is expressly affirmed unless the proposition of law does not form part of the *ratio decidendi* or is an opinion or illustration. (See *Osborne v. Rowlett* [1880] 13 Ch. D 774 and *Close v. Steel Co. of Wales Ltd* [1962] 2 All ER 953. B
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> Judicial hierarchy must be observed in the interests of finality and certainty of the law and for orderly development of legal rules and for the courts and lawyers to regulate their affairs otherwise there is bound to be a state of uncertainty which the principle of precedent is designed to prevent. (See *London Tramways v. London Country Council* [1985] AC 375, *Tunde Apatira and Ors v. Public Prosecutor* [2001] 1 CLJ 381). If this court is not able or decline to follow the final decision of the two Superior Courts, the Court of Appeal and the Federal Court, it can only attempt to do so if the fact in those cases are distinguishable and if those facts were the basis of the decision in the cases. This court is of the view that any contrary view by this court would give rise to an unacceptable degree of 'judicial Schizophrenia' and could tantamount to misconduct or insubordination. Even if there are a series of decisions of the High Court which have faithfully followed each other in the interpretation of a statutory provision, this court is still bound by the decision of the Court of Appeal in conformity with the doctrine of judicial precedent or *stare decisis*). (see *All Persons In Occupation Of The House and The Wooden Stores Erected On A Portion Of Land Held Under Grant No. 26977 For Lot 4271 In The Township Of Johor Bahru, Johor v Punca Klasik Sdn Bhd* [1998] 5 CLJ 49). C D E F

[30] Accordingly, this court ought to follow the principle enunciated in *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* and *Government of the State of Sabah v. Syarikat Raspand (suing as a firm)* where the question is one which turns on the construction of a statute and any contrary view or stand taken by this court will lead to chaos and judicial indiscipline if *stare decisis* is not maintained. G H

[31] As stated above, the plaintiff in fact had ample opportunity to apply to amend the writ by including the Investigating Officer as the defendant. Regrettably, the plaintiff had proceeded with this I

trial without having cited the Investigating Officer as a defendant and he must be prepared to accept the fate of the decision of this court.

[32] In the circumstances, the one and only issue for the determination of this court is, whether there was a remand order obtained to detain the plaintiff from 3 January 2000 till 5 January 2000. Regrettably, the Investigating Officer was not cited as a party to this suit and the plaintiff's claim is against the arresting officer, the first defendant. As agreed, there is no issue on the arrest of the plaintiff by the first defendant. Therefore, the plaintiff ought to have withdrawn his claim against the first defendant and rightfully ought to have included the Investigating Officer as a party in the present case.

[33] Based on the facts and nature of the issue framed and agreed by both parties in this cause of action, this court is of the considered view that it is not the function of this court to look behind the remand order to consider whether the proper procedures under the Criminal Procedure Code had been followed before the remand order was granted by the Magistrate. The plaintiff's cause of action is that, the plaintiff was detained for more than 24 hours without having obtained a remand order as required by s. 117 of CPC. Consequently, it was alleged and as raised as an agreed issue whether the detention from 3 January 2000 till 5 January 2000 was illegal. Hence, the claim is for damages for false imprisonment.

[34] This court also wishes to state that it is not the function of this court to question the regularity of the remand order and how it was obtained. On the other hand, if the plaintiff's case as contended by learned counsel for the plaintiff is that the remand order is defective or invalid in law, the plaintiff should have taken up his complaint by way of criminal revision or appeal against the decision to remand the plaintiff and followed the procedures as laid down under the CPC to take his grievance to the High Court in order to challenge the remand order. (See s. 323 of the CPC and s. 31 of the Courts of Judicature Act 1964). Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature.

[35] However, as stated above, the plaintiff's claim in this suit is that, there was no remand order obtained by the police to detain the plaintiff from 3 January 2000 till 5 January 2000 which this court finds is against the weight of the evidence. The defendants have produced a copy of the remand order (exh. D16) which was granted by Tuan Haji Saad bin Ismail (DW1), a second class Magistrate. (see s. 79(1) and the Fourth Schedule, Subordinate Courts Act 1948 and exhibit D13 and D14). Therefore, on this ground alone, the plaintiff's claim must fail.

[36] As far as the Investigating Officer is concerned, his duty is to simply apply for a remand order if the circumstance so require to the Magistrate as required by s. 117 of the CPC. There is no duty imposed upon the Investigating Officer to question the validity of the remand order given by a Magistrate. So long as the Investigating Officer had obtained the remand order from a Magistrate to detain a suspect who has been arrested for a criminal offense for further investigation, he is deemed to have dutifully carried out his legal obligation as required of him to detain the suspect for further investigation and that it was carried out in accordance with the law. A police officer, in the present case, the Investigating Officer (DW2) who finds that he cannot complete his investigation within the period of 24 hours fixed by s. 28 of the CPC and if he wishes to further detain the person arrested in the present case, the plaintiff, he could act under s. 117 of the CPC and shall produce the plaintiff before the Magistrate to obtain a remand order to detain him and this is what the Investigating Officer had carried out and in accordance to the law. The Investigating Officer (DW2) had carried out his legal duty by having obtained the remand order (exh. D16). As stated above, he has no right to question the validity of the remand order as his duty is merely to carry out his duty pursuant to the remand order as given by the Magistrate. (See *Chong Fook Kam & Anor v. Shaaban & Ors* [1968] 1 LNS 23; [1968] 2 MLJ 50 at p 52-53).

[37] The detention of the plaintiff from 3 January 2000 till 5 January 2000 was carried out by the Investigating Officer (DW2) in obedience to the remand order produced and marked as exh. D16 and as granted by Tuan Haji Saad bin Ismail (DW1), a second class Magistrate. DW1 had confirmed his signature on the remand order and that he had granted the same. Therefore,

there was no issue or any tortious act committed by the Investigating Officer (DW2) who has also not been cited as a party in the present case. There is also no case against the first defendant. Accordingly, the detention of the plaintiff from 3 January 2000 till 5 January 2000 is not false imprisonment as alleged.

[38] This court finds that to all intents and purposes the remand of the plaintiff from 3 January 2000 till 5 January 2000 was valid in law and in accordance of the law. (see *Madjai Sanusi v. Pengarah Imigresen Negeri Johor & Ors* [1999] 7 CLJ 569). In fact, the remand order involves two process or requirements, first, the application by the Investigating Officer to the Magistrate to obtain the remand order, secondly, the order to be made by a judicial officer ie, whether to grant the remand, in order to detain the suspect for further investigation or to refuse the remand. In the present case, both the requirements have been complied. Therefore, the detention of the plaintiff from 3 January 2000 till 5 January 2000 was made pursuant to the remand order (exh. D16). On the face of the remand order, this court finds it is valid. The plaintiff's complaint that there was no remand order is misplaced in law and on the facts and cannot be sustained in law.

[39] As conceded by learned counsel for the plaintiff, this court wishes to stress once again, there is only one issue as agreed and framed by the parties for this court to decide, whether there was a remand order obtained to detain the plaintiff from 3 January 2000 till 5 January 2000. This court was not required to determine the legality of the arrest or the remand order itself but merely to ascertain whether there was in fact a remand order to detain the plaintiff from 3 January 2000 till 5 January 2000. As found by this court, there was a remand order produced by the defendants and marked as exh. D16. In fact, a copy of the remand order was included in the bundle of documents. Accordingly, if the plaintiff was candid and had found that there was in fact a remand order, he should have rightfully withdrawn this cause of action against the defendants after having had sight of a copy of the remand order (exh. D16). Regrettably, that was not the case and the plaintiff still insisted to proceed with the trial despite the fact that a copy of the remand order was included in the bundle of documents and served on the plaintiff's solicitor.

[40] In the present case, the identity of the Investigating Officer could have been easily obtained from the Officer in charge of the Police Station, Rawang since the plaintiff had sent several letters to the Government authorities seeking for information as to whether any remand order was obtained to detain the plaintiff. The submissions of the learned Counsel for the plaintiff that he does not know the name of the Investigating Officer and therefore he was not cited as a party is not acceptable and is not a reasonable explanation and ought to be dismissed. In any event, the plaintiff had ample opportunity from the time this suit was filed on 19 August 2002 to obtain the name of the Investigation Officer and include him as the party in this suit or to apply for an amendment but the plaintiff had failed to act diligently.

[41] Accordingly, the Investigating Officer who was not named or cited as a party or the arresting officer who is the first defendant cannot be held liable for false imprisonment as alleged. (see *Saul Hamid Pakir Mohamad v. Inspector Abdul Fatah Abdul Rahman & Anor* [1999] 1 LNS 83. This court finds that art. 5(4) of the Federal Constitution, s. 28 and s. 117 of the CPC have been complied. Accordingly, the plaintiff's allegation that there was no remand order or there was a breach of art. 5(4) of the Federal Constitution and s. 28(1) and s. 117 of the CPC had been successfully rebutted both by the second class Magistrate (DW1) and the Investigation Officer (DW2). It is important to state that learned counsel for the plaintiff had during the close of his submissions conceded that, in the event, this court finds that there was a remand order (exh. D16) and is acceptable and that the remand order against the plaintiff is valid on the face of it, the plaintiff has no cause of action against the defendants.

[42] The case *In Re The Detention of S. Sivarasa & Ors* [1997] 1 CLJ 471 cited by learned counsel for the plaintiff can be distinguished. In that case, the applicant had by the application for criminal revision challenged the remand order, a judicial decision given by the learned Magistrate on the ground that the procedures as provided under s. 117 of the Criminal Procedure Code was not followed. Accordingly, the High Court set aside the remand order. (See *Madjai Sanusi v. Pengarah Imigresen Negeri Johor & Ors* [1999] 7 CLJ 569, *Leonard Teoh Huih Leong v PP, Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163, *Saul Hamid Pakir Mohamad v. Inspector Abdul Fatah Abdul Rahman & Anor* [1999] 1 LNS 83).

A **[43]** This court finds that the plaintiff has not satisfactorily discharged the onus of proof that is laid on him. On the contrary and based on the facts which includes oral and documentary evidence when taken as a whole, it is an inescapable conclusion that there was in fact a remand order (exh. D16) to detain the
B plaintiff from 3 January 2000 to 5 January 2000. It is also important to be reminded that courts reputation for honesty and impartiality which is important to the judicial oath must be maintained at all times in the discharge of its judicial duty.

C **[44]** In the circumstances and in accordance with the rules of reasons and justice, the plaintiff's claim against the first, second and third defendant is dismissed with costs.

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